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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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Federal Communications Commission
Office of Secretary

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In the Matter of	)	
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Assessment and Collection of Regulatory	)	RM - _____
Fees for Fiscal Year 2006	)	
	)	

To: The Commission

PETITION FOR RULEMAKING

VSNL Telecommunications (US) Inc.

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SUMMARY

VSNL US's proposal is modeled upon the proposal previously submitted by Tyco Telecommunications (US) Inc. ("Tyco"), first in comments filed in the FY 2004 rulemaking on regulatory fees and subsequently in comments filed in the FY 2005 regulatory fees rulemaking. Last year VSNL US completed the acquisition of Tyco's non-common carrier submarine cable landing licenses in the United States and is the successor-in-interest to the Tyco Global Network ("TGN") submarine cable system.[1] VSNL US urges the Commission to modify the IBCF rules and policies by: (1) creating a new IBCF category for non-common carrier submarine cable operators; (2) allocating a portion of the IBCF revenue requirement to the new category for non-common carrier submarine cable operators based on a reasonable and realistic comparative assessment of the FCC regulatory resources used by non-common carrier submarine cable operators; and (3) recovering this portion of the IBCF revenue requirement through a flat annual fee on each non-common carrier submarine cable system.[2]

These reforms are urgently needed because the current capacity-based IBCF regime does not account for the wide disparity in regulatory obligations between non-common carrier submarine cable operators and other entities subject to the IBCF. Reclassifying non-common carrier submarine cable operators as a separate IBCF category will ensure that fee obligations more accurately reflect the regulatory costs reasonably attributable to non-common carrier submarine cable operators for "enforcement activities, policy and rulemaking activities, user information services, and international services," as required by Section 9(a)(1) of the

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1 *See* Action Taken Under Cable Landing License Act, *Public Notice*, DA 05-1268 (released April 29, 2005) (file nos. SCL-ASG-20050304-00003; SCL-MOD-20050304-00004; and SCL-T/C-20050304-00005). VSNL US provides bandwidth and high-capacity international services as the licensee of the TGN Atlantic and Pacific non-common carrier submarine cable systems.

2 VSNL is not proposing any change in the scope of the IBCF category for non-common carrier submarine cable operators.

Communications Act of 1934 (the "Act"). In addition, the current IBCF regime distorts the market for international submarine cable in various other ways. Even at last year's reduced level of $1.37 per 64 KBPS circuit, the IBCF comprises as much as 50 percent of the overall price paid by the customer of the higher-capacity products. In a number of cases where VSNL US has lost a bid to provide service, the total price offered to the customer by VSNL US has been equal to the IBCF. It is inappropriate for the regulatory fee to comprise such a large a percentage of the total purchase price, and it has the unfortunate side-effect of artificially decreasing demand for submarine cable capacity and eliminating incentives for carriers to upgrade their cables. By modifying the IBCF rules and policies as proposed herein, the Commission would minimize the distortions caused in the marketplace by the current IBCF regime.

In the event the Commission desires to retain the capacity-based aspect of the fees, VSNL US nevertheless urges the Commission to adopt the first two prongs of its IBCF reform proposal. Even if the Commission continues to collect the IBCF from non-common carrier submarine cable operators on the basis of active 64 KBPS circuits, such approach will result in fees being more fairly apportioned among providers of international services, as the Act requires, than they currently are.

Finally, while preferring the proposal described herein, VSNL US does not wish to discourage other parties from submitting alternative proposals, or variations on VSNL US's proposal, that embody progress towards achieving real IBCF reform. VSNL's ultimate objective is to reform the current IBCF rules and policies so that non-common carrier submarine cable operators do not continue to pay excessive and disproportionately burdensome regulatory fees.

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To: The Commission

PETITION FOR RULEMAKING

Pursuant to Section 1.401 of the Commission's Rules, 47 U.S.C. § 1.401, VSNL Telecommunications (US) Inc. ("VSNL US"), by its attorneys, hereby petitions to amend the Commission's rules and policies governing the application of international bearer circuit fees ("IBCFs") to non-common carrier submarine cable operators. VSNL US hereby formally requests that the Commission incorporate this petition into the forthcoming *Notice of Proposed Rulemaking* on regulatory fees for fiscal year 2006. IBCF reform needs to occur now; the industry needs this issue to be addressed decisively and quickly in the FY 2006 regulatory fee proceeding rather than being relegated to a separate rulemaking proceeding that may take much longer to resolve.

I. BACKGROUND

Tyco initially advanced a proposal to change the regulatory fee regime for non-common carrier submarine cable operators in comments submitted in the FY 2004 regulatory

fees rulemaking.[3] The Commission concluded in the *FY 2004 Report and Order* that the legal arguments made by Tyco and others warranted further consideration.[4] However, because the Commission had not solicited comments on the issues raised concerning the international bearer circuit fee category, the Commission decided to raise the issues and seek comment in its *FY 2005 NPRM* on possible changes to the circuit-based fee structures for international carriers.[5] Only three parties filed comments and/or reply comments on this issue in the *FY 2005 NPRM*, and the Commission declined at that time to change the methodology for assessing regulatory fees. In addition, the Commission concluded that it had satisfied Tyco's primary concern by reducing the level of the regulatory fee for international circuits.[6] The Commission left open the possibility that parties would re-submit the Tyco proposal or alternatives in the FY 2006 regulatory fees rulemaking.[7]

A. The Regulatory Fee Regime for ICBFs

The ICBF rules are not codified, but they have been articulated in various Commission decisions and informal fact sheets released by the Commission. The IBCF applies to three categories of active international bearer circuits: (i) the circuits used by a facilities-

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3 Comments of Tyco Telecommunications (US) Inc., MD Docket No. 04-73 (filed April 21, 2004) ("Tyco 2004 Comments"); *see also* Comments of Tyco Telecommunications (US) Inc., MD Docket No. 05-59 (filed March 8, 2005) ("Tyco 2005 Comments"); Letter from K. Bressie, Counsel for Tyco, to David Krech, FCC, dated December 15, 2004.

4 *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2004, *Report and Order*, 19 FCC Rcd. 11662, 11672 (¶ 29) ("*2004 Report and Order*").

5 *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2005, *Notice of Proposed Rulemaking*, 20 FCC Rcd. 3885, 3890 (¶¶ 11-17) ("*2005 Regulatory Fee NPRM*").

6 *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2005, MD Docket No. 05-59, FCC 05-137, ¶ 9 (rel. July 7, 2005) ("*2005 Report and Order*"). For FY 2005, the Commission reduced the IBCF to $1.37 per 64 KBPS circuit, which was just over half the $2.52/circuit fee adopted for FY 2004. The reduced fee level stemmed from the substantial increase in the Commission's estimate of active 64 KBPS circuits.

7 *See 2005 Report and Order*, n.18.

based common carrier in any transmission facility to provide service to an end user or resale carrier; (ii) the circuits provided by a non-common carrier submarine cable operator on an IRU basis or by lease to any customer, including itself or its affiliates, other than an FCC-licensed international common carrier; and (iii) the circuits provided by a non-common carrier satellite operator through sale or lease to any customer, including itself or its affiliates, other than an FCC-licensed international common carrier.[8]

Congress annually passes an appropriations bill mandating the amount that the Commission must collect in regulatory fees. As with all other fee categories, the Commission determines each fiscal year how much it must collect from international carriers through the IBCF. Although the statute specifies that that this revenue requirement should be reasonably related to the benefits provided to the payor of the fees by the Commission's regulatory activities, the Commission has not implemented an accurate cost-accounting system.[9] Once the Commission determines the revenue requirement for the IBCF category, it then recovers these revenues by estimating the amount of active capacity among all international bearer circuit operators subject to the fee. Using this estimate, the Commission calculates a fee amount based on active 64 KBPS circuits or circuit equivalents. For FY 2005, the Commission calculated the revenue requirement for international bearer circuits in the amount of $7,244,186.[10] Based on an

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8 *See, e.g.*, What You Owe – International and Satellite License Fees for FY 2005 at 3 (rel. July 2005) (available on the FCC website at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260098A5).

9 *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, 18 FCC Rcd 15985, 16041-41 (concurring statement of Commissioner Adelstein discussing cost accounting; Assessment and Collection of Regulatory Fees for Fiscal Year 2001, *Report and Order*, 16 FCC Rcd. 13525, 13529 (¶¶ 7-8) (discussing problems with previous cost accounting system).

10 *See FY 2005 Report and Order*, Attachment C.

estimate that there would be 5,300,000 active 64 KBPS circuits or circuit equivalents, the Commission established a regulatory fee for FY 2005 of $1.37 per circuit or circuit equivalent.[11]

B. The Statutory Scheme for Amending the Regulatory Fee Schedule

Section 9 of the Communications Act provides the Commission with the authority to amend the regulatory fee schedule.[12] Section 9(a)(1) directs the Commission to assess and collect regulatory fees to recover the costs that it incurs in carrying out "enforcement activities, policy and rulemaking activities, user information services, and international activities."[13] Section 9(b)(3) of the Act authorizes the Commission to make a "permitted amendment" to the regulatory fee schedule when it finds that a Commission rulemaking or change in law has added, deleted, or changed the Commission "services" provided to the payor of the fee such that the fee no longer reasonably relates to the benefits of those services.[14]

In order to amend the fee schedule under this provision, Section 9(b)(3) requires the Commission to adopt regulations amending the fee schedule to comply with Section 9(b)(1)(A), which requires that the fees should "take into account factors that are reasonably related to the benefits provided to the payor of the fee." Section 9(b)(3) further requires the Commission to adjust the fee schedule to reflect "changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in the law."[15] Thus, any party seeking reform of the regulatory fee schedule may seek to show that its proposed alternative would more closely align the fee with the benefits received by the payor in light of changes in the Commission's services resulting from rulemakings or changes in the law. In cases where the

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11 *Id.*

12 47 U.S.C. § 159(b).

13 47 U.S.C. § 159(a)(1).

14 47 U.S.C. § 159(b)(3).

15 *Id.*; *see also COMSAT Corp. v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997).

Commission adopts a "permitted amendment" of the fee schedule pursuant to Section 9(b)(3), according to the statute and relevant case law, the Commission's action will not be subject to judicial review.[16]

As discussed below, VSNL US believes that its proposal to amend the regulatory fee regime governing the application of IBCFs to non-common carrier submarine cable operators satisfies the requirements of Section 9(b)(3), as construed by the D.C. Circuit. The Commission, therefore should, and must, use its permitted amendment authority to reclassify non-common carrier submarine cable operators into a separate fee category for the assessment of an annual flat fee on a per-system basis.

II. VSNL US'S PROPOSAL TO AMEND THE RULES GOVERNING THE APPLICATION OF THE IBCF TO NON-COMMON CARRIER SUBMARINE CABLE OPERATORS

VSNL US's proposal to amend the regulatory fee regime governing the application of the IBCFs to non-common carrier submarine cable operators consists of three parts.

First, the Commission should reclassify non-common carrier submarine cable service as a new fee category separate from other entities subject to the IBCF. Under this proposal, there would be at least two separate fee categories – non-common carrier submarine cable operators would be in one category, and all other carriers subject to IBCFs would be in the other category. This classification does not constitute a dramatic departure from the current IBCF rules, which already recognize non-common carrier submarine cable operators as one of three categories of providers subject to the IBCF.

Second, the Commission should apportion the IBCF revenue requirement between the two categories. Given that the Act specifies that this revenue requirement should be

[16] *See* 47 U.S.C. § 159(b)(3); *COMSAT*, 114 F.3d at 227-28.

reasonably related to the benefits provided to the payor of the fees by the Commission's regulatory activities, the Commission should apportion the revenue requirement between the two categories based upon a comparative assessment of the regulatory services used by entities in each category. As discussed below, non-common carrier submarine cable operators use far fewer regulatory resources than other entities subject to the IBCF regime.

VSNL US recommends that the Commission use an employee- or employee-hour equivalent to determine the allocation of revenues between the two categories as a proxy for regulatory activity as directed by the Act. This recommendation is in accord with Section 9(b) of the Act, which provides that regulatory fees shall "be derived by determining the full-time equivalent number of employees performing the activities described in [Section 9(a)]."[17] Alternatively, given that the Commission completed a similar analysis when the initial apportionment was made, it could use its expertise and familiarity with its own workforce and activities to estimate the percentage of the revenue requirement that should be allocated to non-common carrier submarine cable systems. Based on our understanding of the comparative regulatory burden caused by non-common carrier submarine cable systems, VSNL US recommends that, as a starting point, no more than 10 percent of the total IBCF revenue requirement should be recovered from non-common carrier submarine cable systems.

Third, the Commission should adopt a flat annual fee per cable system for non-common carrier submarine cable operators. The amount of the fee would be derived by dividing the revenue requirement for non-common carrier submarine cable systems by the number of licensed systems. This system-based approach would ensure that the Commission would recover its regulatory costs from all non-common carrier submarine cable systems. As the Commission

[17] 47 U.S.C. § 159(b)(1)(A).

has already recognized, a fee system based on cable landing licenses/authorizations rather than capacity "would be administratively simpler for both the Commission and carriers."[18] The Commission also found that a fee system based on licenses/authorizations "could provide an incentive for carriers to initiate new services and to use new facilities more efficiently."[19]

VSNL US submits that imposing the IBCF on a per-system basis, rather than a capacity basis, for non-common carrier submarine cable operators embodies a regulatory regime that is most consistent with the statutory requirements and the public interest. However, should the Commission desire to retain the capacity-based aspect of the current IBCF regime, VSNL US urges the Commission to expeditiously adopt the first two parts of the proposal. The Commission would first establish a revenue requirement for non-common carrier submarine cable operators (*e.g.*, 10% of the overall IBCF revenue requirement), and then calculate the IBCF for non-common carrier submarine cable operators by dividing the estimated number of active 64 KBPS circuits on cable systems in this category into the IBCF revenue requirement for this category. Individual non-common carrier submarine cable operators would then calculate the applicable fee in the same manner as they do today.

III. UNDER THE CURRENT REGIME, NON-COMMON CARRIER SUBMARINE CABLE LICENSEES OPERATING HIGH-CAPACITY CABLES SHOULDER A DISPROPORTIONATELY LARGE REGULATORY FEE BURDEN WITHOUT ANY JUSTIFIABLE LEGAL OR REGULATORY BASIS

Under the current regime, all international carriers, including non-common carrier submarine cable operators, are required to pay regulatory fees based on the number of active 64 KBPS international bearer circuits as of December 31 of the previous year. However, the number of active 64 KBPS circuits bears no relationship to the regulatory costs that operators

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18 *See 2004 Report and Order*, 19 FCC Rcd. 11672 (¶ 29).

19 *Id.*

generate. As explained below, the current capacity-based IBCF regime (1) distorts the market for submarine cable capacity in favor of low-capacity operators without any justifiable regulatory basis, thereby disserving the public interest, (2) is inconsistent with the Communications Act because regulatory fees paid by non-common carrier submarine cable operators are not "reasonably related to the benefits provided to the payor of the fee by the Commission's activities," and (3) uses inaccurate capacity estimates to establish the IBCF level each year.

A. Adoption of the VSNL US Proposal Would Eliminate the Market Distortions Created by the Existing Capacity-Based Regime for Non-Common Carrier Submarine Cable Systems

The current regime is not "cost causative" in that it imposes disproportionately higher costs on licensees operating high-capacity systems even though these systems generate no higher regulatory costs than low-capacity systems. The reason is that the Commission's regulatory costs (primarily although not wholly licensing related) are largely incurred on a per-system basis, not on a per-capacity basis. For example, if Operator A has a system with twice the active capacity of Operator B, Operator A pays twice the fees even though the Commission's costs of regulating the two systems may be largely the same.[20] Similarly, an operator that doubles its active capacity through a cable system upgrade will pay double the regulatory fees, even though the Commission exercises no additional regulatory oversight nor is the Commission incrementally burdened by the upgrade. The operator's fees are doubled even though it is not required to obtain any Commission consent to effect such upgrade nor does it even report such capacity upgrades to the Commission in any periodic filing.

A high-capacity non-common carrier submarine cable system imposes the same or nearly the same regulatory costs on the Commission as a low-capacity non-common carrier

[20] This hypothetical assumes that Operator A and Operator B each operates a submarine cable system with the same regulatory classification (e.g., common carrier or non-common carrier).

system, as each requires only a single landing license. However, depending on the actual capacities of their respective systems, the high-capacity operator may pay fees many orders of magnitude greater than the low-capacity operator. As a result, the current regime significantly overcharges high-capacity system operators while subsidizing low-capacity system operators because each generates the same or nearly the same regulatory costs on a system-by-system basis.

1. The Current Regime Suppresses Demand for High-Capacity Services

The effect of overcharging high-capacity licensees is to artificially inflate the prices charged to their customers, whether carriers or large end users (*e.g.*, Internet service providers), which in turn causes demand to be artificially suppressed. If lower, cost-based fees were imposed according to Section 9, the overall price paid by customers of high-capacity systems would drop and demand would be stimulated to a more efficient level. Current pricing, which reflects excessive regulatory fees, results in a misallocation of scarce economic resources and an underutilization of non-common carrier submarine cable capacity. These fees also create a disincentive for existing or prospective carriers to build new, or upgrade existing, high-capacity submarine cable systems.

2. Non-Common Carrier Submarine Cable Operators Subsidize Facilities-Based Common Carriers Under the Current Regime

The current IBCF regime ensures that non-common carrier submarine cable operators effectively subsidize facilities-based common carriers subject to the fee. The Commission imposes the same per-unit charge on facilities-based common carriers and non-common carrier submarine cable operators, even though non-common submarine carrier operators impose far smaller regulatory costs on the Commission since they are not subject to the Commission's broad range of regulatory obligations set forth in Part 63 governing international

common carriers, which require more substantial Commission resources.[21] Non-common carrier submarine cable operators generate only a fraction of the regulatory costs common carriers generate for "enforcement activities, policy and rulemaking activities, user information services, and international activities," yet the current system requires them to pay the same per unit regulatory fees. In charging all international bearer circuit operators the same regulatory fees, non-common carrier submarine cable systems are effectively forced to subsidize facilities-based common carriers.

3. The Current Regime Does Not Promote the Efficient Use of Commission Resources

High-capacity cable systems are more efficient users of scarce Commission resources than low-capacity systems, yet that efficiency benefit is neutralized by the capacity-based fees imposed under the current IBCF rules and policies. In Section 9(b)(1) Congress sought to calibrate fee payments against the receipt of regulatory services, thereby creating an incentive for carriers to build systems that maximize the efficient utilization of scarce regulatory resources. Unfortunately, a capacity-based fee creates no incentive for carriers to use Commission resources efficiently since they pay the same fee regardless whether they use many or few regulatory resources. The Commission should correct this regulatory inefficiency by modifying the rules to ensure that high-capacity cable systems do not shoulder a disproportionate IBCF burden.

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[21] Under the Commission's rules, facilities-based common carriers are obligated to, among other things: request global authority from the Commission for the provision of telecommunications services; file with the Commission certain intercarrier contracts, including correspondent agreements; file annual traffic reports with the Commission; file annual circuit status reports with the Commission; comply with the Commission's international settlements policy; and provide adequate notice to all affected customers before discontinuing, reducing, or impairing service.

4. Assessing the IBCF Based on System Capacity Artificially Distorts the Marketplace

Recent technological developments have allowed non-common carrier submarine cable operators to make substantial increases in system capacity. As capacity has surged, prices have dropped dramatically for high-capacity products.[22] The decline in the level of the IBCF has not matched the price decline for high-capacity products, with the result that the IBCF now equates to 100 percent or more of the annual non-IBCF revenues that non-common carrier submarine cable operators earn from sales or leases of capacity, particularly for certain high-capacity products.[23] Put in other words, even at last year's reduced rate, the IBCF comprised 50 percent or more of the overall price paid by the customer on both the Atlantic and Pacific routes, thereby impeding VSNL US's commercial ability to sell high-capacity products on both routes. VSNL submits that it is inappropriate for the regulatory fee to comprise such a large percentage of the total purchase price.

This situation has created an environment where VSNL US has been forced to walk away from a number of transactions where another provider has represented to the customer that it would not charge the IBCF. In addition, VSNL US has learned that large end users, such as governmental agencies and educational institutions, are unwilling to pay the IBCF even at its current level, which, in many cases, has effectively precluded VSNL US from submitting bids.

The steady increase in the annual IBCF as a percentage of the total price paid by the customer for high-capacity products – as noted above, the IBCF is often equal to 100 percent

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22 *See* Tyco 2004 Comments at 8 (showing that trans-Atlantic capacity increased by approximately 1,800 percent from 1998 to 2002 while trans-Atlantic prices dropped by 90 percent, and trans-Pacific capacity increased by 2,500 percent in the same time period while prices dropped by 90 percent).

23 The level of the IBCF has declined from $7.00 per 64 KBPS circuit in fiscal year 1999 to $1.37 per 64 KBPS circuit in FY 2005.

or more of the non-IBCF price paid by the customer – is distorting the market conditions that affect decisions on whether to install more efficient systems, increase capacity on existing systems, or retire cables. For example, the unintended consequence of excessive regulatory fees on non-common carrier submarine cable operators is that many carriers, including VSNL US, are not willing to increase capacity on their trans-Atlantic systems since the marginal cost of the upgrade together with the substantial increase in annual regulatory fees associated with the increased capacity will not exceed the price paid by the customers for such capacity. This not only stifles competition, it discourages the development of innovative capacity offerings by carriers, ISPs and educational institutions. Further, the IBCF has artificially reduced the demand for high-capacity products offered by non-common carrier submarine cable operators, thereby preventing both carriers and customers alike from fully realizing the efficiencies available from higher-capacity product offerings.

B. Adoption of the VSNL US Proposal Would Ensure that the Regulatory Fees Paid by Non-Common Carrier Submarine Cable Systems Are Consistent with the Act

Section 9 of the Act requires the Commission to recover through annual regulatory fees the costs that it incurs in carrying out enforcement activities, policy and rulemaking activities, user information services, and international activities.[24] The Act further directs the Commission in Section 9(b)(1)(A) to derive regulatory fees by taking into account "factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[25] Section 9(b)(3) of the Act requires the Commission to amend the regulatory fee schedule to comply with the requirements of Section 9(b)(1)(A) and to reflect any

24 47 U.S.C. § 159(a)(1).

25 *Id.*

change in Commission "services" provided to the payors of the fees due to Commission rulemaking or other change in law.[26]

As explained above, the regulatory fees paid by non-common carrier submarine cable operators bear no relationship to the regulatory costs they generate and thus are no longer "reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[27] In particular, the current capacity-based regime does not satisfy the requirements of Section 9 because it imposes a disproportionately large regulatory fee burden on high-capacity non-common carrier submarine cable systems even though these systems generate no higher regulatory costs than other systems. This distorts the market in favor of low-capacity systems, which disserves the public interest. The current capacity-based regime also imposes the same per-unit charge on all international bearer circuits even though the Commission spends significantly less resources on regulating non-common carrier submarine cable systems than it does on regulating facilities-based common carriers.

VSNL US's proposal would fully comport with the Act by tying regulatory fees to regulatory benefits. Adoption of the proposal would also eliminate market distortions and overcharges, thereby advancing the public interest. Moreover, adoption of the proposal would also allow the Commission to fulfill its statutory obligation to amend regulatory fees when the existing system disserves the public or does not properly reflect the costs for the level of Commission regulatory activity attributable to that service.[28]

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26 47 U.S.C. § 159(b)(3).

27 47 U.S.C. § 159(a)(1).

28 47 U.S.C. § 159(b)(3).

C. Adoption of the VSNL US Proposal Would Ensure Uniform and Consistent Industry Wide Compliance with Regulatory Fee Payment Obligations

Unfortunately, there is no easy way for the Commission to ensure uniform and consistent industry-wide compliance under the current regime. The result is that different carriers may adopt different and inconsistent approaches to complying with the IBCF rules. The Commission does not directly monitor active non-common carrier submarine cable capacity today, and thus the Commission has no ready way to ensure consistent application of the IBCF rules by all non-common carrier submarine cable operators. Adoption of the VSNL US proposal would eliminate the monitoring and enforcement issues created by the current regime. Under a system-based fee approach, the amounts to be paid would be derived by dividing the revenue requirement for non-common carrier submarine cable operators by the number of licensed cable landing systems. This system-based approach would ensure that the Commission equitably recovers its regulatory costs from all non-common carrier submarine cable systems without distorting market conditions.

IV. THE ACT REQUIRES THE COMMISSION TO ADJUST THE METHODOLOGY FOR ASSESSING REGULATORY FEES WHEN IT NO LONGER LEADS TO AN APPROPRIATE RESULT.

Section 9(b)(3) of the Act requires the Commission to amend the regulatory fee schedule when it finds that a Commission rulemaking or change in law has added, deleted, or changed the Commission "services" provided to the payor of the fee such that the fee no longer reasonably relates to the benefits of those services.[29] In order to amend the fee schedule, the Commission must justify the change on the basis of "changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in the law."[30]

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29 47 U.S.C. § 159(b)(3).

30 *Id.*; *see also COMSAT Corp. v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997).

As described in Tyco's separate analysis addressing the Commission's legal authority to amend the schedule of regulatory fees pursuant to Section 9(b)(3),[31] recent changes in law and the Commission's rules compel an amendment to the regulatory fee schedule governing the application of ICBFs to non-common carrier submarine cable operators, including: the entry into force of U.S. WTO/GATS commitments in basic telecommunications; the Commission's implementation of those commitments in the *Foreign Participation Order*; Congress's enactment of the Telecommunications Act of 1996, the Commission's related rulemaking proceedings streamlining the international Section 214 authorization process; and the Commission's submarine cable streamlining proceeding.

These four changes fundamentally shifted the nature of Commission services. Prior to these changes, the Commission's regulatory activities were focused on constraining monopoly power by regulatory fiat. Through these changes, and related initiatives, the Commission reoriented its regulatory direction entirely by striving to eliminate market distortions by adopting pro-competitive and deregulatory policies. In particular, these changes significantly altered the regulatory requirements landscape for non-common carrier submarine cable licensees. As a result of these changes, non-common carrier submarine cable capacity has surged, prices have plunged, and the need for regulatory oversight has diminished.

As described more fully in the Tyco letter, the implementation of these changes in law and regulations reflect changes in Commission services provided to non-common carrier submarine cable operators that result directly from changes in law and changes in the Commission's rules, and thus satisfy the requirements of Section 9 of the Act. Accordingly, if the Commission amends the regulatory fee schedule in response to the changes in services

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[31] *See* Letter from Kent D. Bressie, Harris, Wiltshire & Grannis LLP, to David Krech, FCC, dated December 15, 2004.

resulting from the aforementioned rulemakings and changes in law, it would be acting within the scope of its statutory authority to amend the fee schedule under Section 159(b)(3), as required by law, and therefore, not be subject to judicial review.[32] It is noteworthy that no party commenting in the proceeding establishing regulatory fees for fiscal year 2005 disputed Tyco's conclusions that recent Commission rulemakings and changes in law justify the Commission to amend the regulatory regime governing non-common carrier submarine cable operators.

The current regime imposes a regulatory burden on non-common carrier submarine cable operators that bears no relationship to the level of Commission activities that they generate. VSNL US understands that regulatory fees need not be precisely calibrated on a service-by-service basis to the actual costs of the Commission's regulatory activities for that service.[33] However, while it may be that these changes did not immediately decrease the Commission's regulatory activities associated with non-common carrier submarine cable operations, it is hardly disputable that such activities, by orders of magnitude, are now demonstrably less. The manifest disparity in regulatory burden between facilities-based common carriers and non-common carrier submarine cable operators that has resulted from the changes in rulemaking and law not only justifies a permitted amendment pursuant to Section 9(b)(3), but also compels the Commission to act now to remedy the problems inherent in the exiting regime.

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32 *COMSAT*, 114 F.3d at 227-28.

33 *See, e.g., 2004 Report and Order*, 19 FCC Rcd. 11665 (¶ 6).

V. CONCLUSION

VSNL US respectfully urges the Commission to adopt the changes proposed herein to the IBCF rules and policies.

Respectfully submitted,

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February 3, 2006

CERTIFICATE OF SERVICE

I, Theresa A. Baum, hereby certify that a true and correct copy of the foregoing Petition for Rulemaking, on behalf of VSNL Telecommunications (US) Inc., was delivered via e-mail, this 3rd day of February, 2006, to the individuals below.

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